

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

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| In the Matter of |) | Case Nos.: 09-N-10719, 09-O-10859, |
| |) | 09-O-10860 -DFM |
| JOHN WILLIAM FINDLEY |) | |
| |) | |
| Member No. 154516, |) | DECISION |
| |) | |
| A Member of the State Bar. |) | |

INTRODUCTION

In this disciplinary proceeding, respondent **John William Findley** (“Respondent”) is found culpable, by clear and convincing evidence, of: (1) willfully failing to comply with California Rules of Court, rule 9.20¹; as ordered by the California Supreme Court on October 28, 2008, effective November 27, 2008; (2) willfully failing to comply with the conditions of his probation, as also ordered by the California Supreme Court on October 28, 2008; and (3) willfully failing to comply with the conditions of his probation, as ordered by the California Supreme Court on November 16, 2005, effective December 16, 2005. In view of the nature of Respondent’s misconduct, its long-standing continuation, and Respondent’s lack of rehabilitation or remorse, the court recommends that Respondent be disbarred from the practice of law.

PERTINENT PROCEDURAL HISTORY

On February 1, 2010, the Office of the Chief Trial Counsel of the State Bar of California (“the State Bar”) filed its Notice of Disciplinary Charges (NDC) in Case No. 09-N-10719. It

¹ All references to rule 9.20 are to California Rules of Court, rule 9.20.

consists of a single count alleging that Respondent failed to comply with the October 2008 order of the Supreme Court, requiring Respondent to file with the clerk of this court a declaration of timely compliance with rule 9.20.

On the following day, February 2, 2010, the State Bar filed an NDC in Case Nos. 09-O-10860 and 09-O-10859, alleging that Respondent had failed to comply with the conditions of probation ordered by the Supreme Court in 2008 (S166367) and 2005 (S136732).

On March 2, 2010, Respondent, acting in pro per, filed responses to both NDC's. In his responses, he denied all allegations, contested the jurisdiction of the State Bar Court, and demanded a jury trial.

On March 16, 2010, an initial status conference was held in the matters, at which time the cases were consolidated and a trial date of July 13, 2010 (with a one-day estimate) was scheduled. In addition, a pretrial conference date of July 6, 2010 was scheduled, with pretrial conference statements ordered to be filed on or before June 28, 2010. A written order containing all of these deadlines was filed and served on March 16, 2010.

The pretrial conference was held, as scheduled, on July 6, 2010. The State Bar was represented by Deputy Trial Counsel Christine Souhrada. Respondent did not appear. He also failed to file a Pretrial Conference Statement or participate in the pretrial conference meet-and-confer procedures prescribed by this court's order and by rules 1221-1223 of the Rules of Practice of the State Bar Court. This court then issued an order that Respondent show cause in writing, on or before the commencement of trial, why his failure to participate in the pretrial conference proceedings should not result in the exclusion of his witnesses and exhibits at trial. (Rules of Proc. of State Bar, Rule 211(f).) In this same order, Respondent's demand for a jury trial was denied.

On July 12, 2010, the day before the commencement of trial, Respondent filed a pretrial statement. In it he objected to being called by the State Bar as a witness at trial, based on the Fifth Amendment right against self-incrimination. On the same day, Respondent filed a motion to dismiss the proceedings. For the reasons stated below, that motion is denied.

Trial commenced on July 13, 2010, as previously scheduled, and was completed on July 14. Respondent appeared and acted as his own counsel. The State Bar was represented by DTC Souhrada. Prior to the commencement of trial, no written showing was made by Respondent as to why he had not timely filed a pretrial statement. The State Bar rested its case without seeking to call Respondent as a witness at trial. Respondent, without objection from the State Bar, then called himself as a witness. Thereafter, when Respondent sought to call DTC Souhrada as a witness, this court excluded such testimony under rule 211(f). After both sides rested, the matter was submitted on July 14, 2010.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction

Respondent was admitted to the practice of law in California on December 16, 1991, and has been a member of the State Bar at all relevant times.

Case No. 09-N-10719

On April 25, 2008, Respondent entered into a Stipulation Re Facts, Conclusions of Law and Disposition (“the 2008 Stipulation”) with the State Bar in Case Nos. 06-O-11469 and 06-O-11965. This stipulation included an agreement by Respondent that he “must comply with the requirements of rule 9.20, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court’s order” in that matter.

On May 1, 2008, the Hearing Department of this court filed an order approving the stipulation and recommending its terms to the Supreme Court, including the obligation to comply with rule 9.20.

On October 28, 2008, the California Supreme Court filed a disciplinary order in Case No. S166367 (“the 2008 Supreme Court Order”). This order included the express requirement that Respondent comply with rule 9.20, California Rules of Court, by performing the acts specified in subdivisions (a) and (c) within 30 and 40 days, respectively, after the effective date of the Supreme Court order. This order was properly served on Respondent and became effective on November 27, 2008.

Respondent failed to file a declaration of compliance, as required by subdivision (c) of rule 9.20, until June 7, 2010. That effort at compliance was months after the NDC had been filed in this matter, just slightly more than a month before the case was scheduled to commence trial, and well more than a year after the compliance deadline.

Failure to Obey Supreme Court Order to Comply with Rule 9.20

Rule 9.20(c) mandates that Respondent “file with the Clerk of the State Bar Court an affidavit showing that he . . . has fully complied with those provisions of the order entered under this rule.” The term “willful” in the context of rule 9.20, formerly rule 955, does not require bad faith or any evidence of intent. It is not necessarily even dependent on showing the Respondent’s knowledge of the Supreme Court’s order requiring compliance. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341-342; *Hamilton v. State Bar* (1979) 23 Cal.3d 868, 873-874.) Based on the foregoing, the court concludes that Respondent willfully failed to comply with rule 9.20, as ordered by the Supreme Court.

Respondent filed on July 12, 2010, a motion to dismiss this case, based on the time limitation of rule 582 of the Rules of Procedure. A review of the date of eventual compliance by Respondent of his rule 9.20(c) obligation, however, makes clear that the filing of the NDC was timely. All other contentions made in the motion, with regard to this matter and the other two cases, are without merit as well.

Case No. 09-O-10860

As part of the 2008 Stipulation, Respondent agreed to be subject to two years of probation, including certain specified conditions of probation. Those conditions of probation were subsequently approved and recommended to the Supreme Court by the hearing department and then included in the 2008 Supreme Court Order.

Pursuant to the 2008 Supreme Court Order, the conditions of probation with which Respondent was required to comply included the following:

- a. Within 30 days from the effective date of discipline, to contact the Office of Probation and schedule a meeting with Respondent's assigned probation deputy to discuss the terms and conditions of probation;
- b. To submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the probationary period; and
- c. Successfully complete the State Bar Ethics School within one year of the effective date of discipline and provide to the Office of Probation satisfactory proof of attendance and passage of the test given at the end of the session.

On November 25, 2008, the Office of Probation sent to Respondent a letter outlining his obligations created by the 2008 Supreme Court Order, providing him with the requisite forms to complete in order to comply, and setting out the deadlines for compliance with each condition.

The letter also included substantial guidance to Respondent about what he needed to do to comply with the various obligations but ended with the admonition, “Please note that the Court has determined that the repeated need of the State Bar to actively intervene to seek compliance with disciplinary terms and conditions is inconsistent with the self-governing nature of probation as a rehabilitative part of the attorney discipline system. *In the Matter of Gorman* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 567, 573.” The letter also warned that “Failure to timely submit reports or any other proof of compliance **may result in a non-compliance referral** which may lead to the imposition of additional discipline.” [emphasis in original]

Despite the language of the 2008 Supreme Court Order and the letter from the Office of Probation, both of which were received by Respondent, Respondent failed to comply with each of the above conditions of probation. He failed to contact the Office of Probation and schedule a meeting with Respondent’s assigned probation deputy by the due date of December 27, 2008. He failed to file on a timely basis the quarterly reports due on January 10, 2009; April 10, 2009; July 10, 2009; and October 10, 2009.² Finally, he has failed even to attend the State Bar’s Ethics School, which he was required to attend and pass before November 27, 2009.

Failure to Comply with Conditions of Probation [Bus. & Prof. Code, Section 6068(k)]

Business and Professions Code section 6068, subsection (k), provides that it is the duty of every member to “comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.” Respondent’s conduct in failing to comply with the conditions of probation, set forth above, constituted a willful violation by him of this obligation.

² He did not file any of these reports until June 4, 2010, months after the NDC was filed in the matter and shortly before it was scheduled to commence trial.

Case No. 09-O-10859

On November 16, 2005, the California Supreme Court filed an order in Case No. S136732 (State Bar Case No. 02-O-12058), ordering that Respondent be suspended from the practice of law for one year, that execution of the suspension be stayed, and that he be placed on probation for two years on condition that he be actually suspended for 30 days. (“the 2005 Supreme Court Order”), Respondent was further ordered to comply with the conditions of probation recommended by the Review Department of this court in a decision filed by it on June 15, 2005. Respondent was properly served with the 2005 Supreme Court Order, which became effective on December 16, 2005.

Pursuant to the 2005 Supreme Court Order, the conditions of probation with which Respondent was required to comply included the following:

- a. To submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the probationary period; and
- b. Successfully complete the State Bar Ethics School within one year of the effective date of discipline and provide to the Office of Probation satisfactory proof of attendance and passage of the test given at the end of the session.

On November 29, 2005, the Office of Probation sent to Respondent a letter outlining his obligations created by the 2005 Supreme Court Order, providing him with the requisite forms to complete in order to comply, and setting out the deadlines for compliance with each condition. The letter also included substantial guidance to Respondent about what he needed to do to comply with the various obligations and included an admonition that failure to timely comply with the probation conditions “will result” in a non-compliance referral by the Office of Probation.

Despite the language of the 2005 Supreme Court Order and the letter from the Office of Probation, both of which were received by Respondent, Respondent failed to comply with each of the above conditions of probation. He failed to file on a timely basis the quarterly reports due on January 10, 2006, April 10, 2006, October 10, 2006, and January 10, 2007. He has never filed the quarterly reports due on July 10, 2006, April 10, 2007, July 10, 2007, and October 10, 2007, and the final report due on December 16, 2007. Finally, he has never attended the State Bar's Ethics School, which he was required to attend and pass before December 16, 2006.

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)³ The court finds the following aggravating factors.

Prior Discipline

As noted above, Respondent has been formally disciplined on two prior occasions. Respondent's prior record of discipline is an aggravating circumstance. (Std. 1.2(b)(i).)

Lack of Insight and Remorse

Respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) He remains defiant and has no insight regarding his unethical behavior.

Throughout the trial Respondent sought to blame the Office of Probation for his failure to comply with his court-ordered obligations. He even complained that the Office of Probation had not appointed a probation monitor to "pester" him into complying with the terms of his probation. This contention both lacks any merit and reflects Respondent's continuing lack of

³ All further references to standard(s) or std. are to this source.

recognition of his personal responsibility for conforming his professional conduct with his professional and legal obligations. As Respondent was explicitly advised by the Office of Probation in its November 2008 letter, the Supreme Court “has determined that the repeated need of the State Bar to actively intervene to seek compliance with disciplinary terms and conditions is inconsistent with the self-governing nature of probation as a rehabilitative part of the attorney discipline system. *In the Matter of Gorman* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 567, 573.”

The law does not require false penitence. But it does require that the respondent accept responsibility for his acts and come to grips with his culpability. (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) Despite two prior disciplinary efforts by the Supreme Court and the State Bar, Respondent continues to fail completely in that regard.

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Standard 1.2(e).) There is no clear and convincing evidence here of any significant mitigating factor.

While Respondent testified to health and family problems in late 2008 and early 2009, such testimony was not convincing and does not explain why Respondent has failed to comply with court-ordered obligations dating back to 2005.

In addition, while Respondent testified and argued that his lack of timely compliance resulted from the Office of Probation’s alleged failure to adequately pester him for compliance, that evidence is an aggravating factor, not a mitigating one.

As an additional claimed mitigating factor, Respondent argued that he understood that his probation somehow disappeared when he was administratively suspended by the State Bar in 2007.⁴ That testimony by Respondent was neither credible nor reasonable.

Finally, while the State Bar did introduce evidence that Respondent had eventually filed some of the tardy quarterly reports and had eventually filed his rule 9.20 compliance statement, such compliance came only after Respondent was aware that the State Bar was initiating disciplinary proceedings against him and was just prior to the commencement of trial. While tardy compliance is clearly better than continued non-compliance, it warrants scant mitigation credit under the circumstances here.

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession, and maintain the highest possible professional standards for attorneys.

The primary purposes of attorney discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Although the standards are not binding, they are to be afforded great weight because “they promote the consistent and uniform application of disciplinary measures.” (*In re Silvertown* (2005) 36 Cal.4th 81, 91-92.)

⁴ At the request and/or concurrence of the parties, the Court now takes judicial notice that Respondent was suspended on March 28, 2007, due to his failure to pass the Multi-State Professional Responsibility Examination, as he was ordered to do in the 2005 Supreme Court Order.

Nevertheless, the court is "not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994, quoting *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the courts consider relevant decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

The State Bar argues that the circumstances of this case, including the applicable standards, call for disbarment. This court agrees.

The standard here for assessing the appropriate discipline for Respondent's failure to timely comply with his obligations under rule 9.20 is set out in the rule itself. Rule 9.20(d) states, in pertinent part: "A suspended member's willful failure to comply with the provisions of this rule is a cause for disbarment or suspension and for revocation of any pending probation." Respondent's willful failure to comply with rule 9.20 is extremely serious misconduct for which disbarment is generally considered the appropriate sanction. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.)

Standard 1.7(b) provides that, when an attorney has two prior records of discipline, the degree of discipline in the current proceeding is to be disbarment unless the most compelling mitigating circumstances clearly predominate. There are no such mitigating circumstances in this matter. There are only aggravating factors. That Respondent continues to be habitually

unable or unwilling to comply with his court-ordered professional obligations, despite two prior unsuccessful efforts by the disciplinary process to modify his behavior, provides clear and convincing proof that any further efforts to rehabilitate him will be futile. As a result, his disbarment is necessary to protect the public, the courts and the legal community; to maintain high professional standards; and to preserve public confidence in the legal profession.

RECOMMENDED DISCIPLINE

Disbarment

The court hereby recommends that respondent **John William Findley**, Member No. 154516, be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys in this State.

Rule 9.20

The court further recommends that the Supreme Court order Respondent to comply with California Rules of Court, rule 9.20, paragraphs (a) and (c), within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter.⁵

Costs

The court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

It is ordered that Respondent be transferred to involuntary inactive enrollment status pursuant to section 6007, subdivision (c)(4), and rule 220(c) of the Rules of Procedure of the

⁵ Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar, supra*, 44 Cal.3d 337, 341.)

State Bar. The inactive enrollment will become effective three calendar days after service of this order.

Dated: March _____, 2011

DONALD F. MILES
Judge of the State Bar Court